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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

FILE

Office: San Francisco

Date:

JUN 05 2003

IN RE: Applicant:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under
Sections 212(i) and 212(a)(9)(B)(v) of the Immigration and
Nationality Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision in your case. All documents have been reviewed by the office that originally decided your case. Any further inquiry must be made to that office.

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a third motion to reopen. The motion will be granted, and the order dismissing the appeal will be withdrawn. The appeal will be sustained, and the application will be approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), and 1182(a)(9)(B)(i)(II), for having procured admission into the United States by fraud or willful misrepresentation in March 1995 and for having been unlawfully present in the United States for one year or more. The applicant married her present spouse (hereafter referred to as Mr. [REDACTED]) in Mexico in January 1995, and he became a naturalized U.S. citizen in November 1998. The applicant is the beneficiary of an approved Petition for Alien Relative. The applicant seeks the above waiver under sections 212(i) and 212(a)(9)(B)(v), 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v).

On June 6, 2000 the district director concluded, that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The AAO affirmed that decision on appeal and on two subsequent motions.

On third motion, counsel submits additional evidence relating to Mr. [REDACTED] injury on October 13, 2000, and his physical disability, which was not previously contained in the record for review. Mr. [REDACTED] applied for Workers' Compensation Benefits on October 27, 2000, based on an injury sustained at work on October 13, 2000, and the application was supported by a qualified medical examination. Counsel indicates that Mr. [REDACTED] continues to be permanently employed, but permanently physically restricted in his activities. Counsel states that Mr. [REDACTED] would be unable to find employment in Mexico if he accompanied the family there. Counsel indicates that Mr. [REDACTED] hardships would increase due to his disability if he remained in the United States to raise his two children alone or if he remained in the United States alone if the applicant returned to Mexico, with or without the two children.

The record now contains a Request for Qualified Medical Evaluator dated June 24, 2001, relating to Mr. [REDACTED] injury. The Qualified Medical Evaluation in the record begins on page 3, as pages 1 and 2 are missing. In that evaluation, Dr. [REDACTED] states that Mr. [REDACTED] presented himself at the office on November 15, 2000, with complaints of neck, mid-back and lumbar pain with weakness in the lower extremities. Mr. [REDACTED] was treated and Dr. [REDACTED] extended disability through March 2001, at which time Mr. [REDACTED] returned to modified work and has continued on modified work to the date of the exam. Dr. [REDACTED] states that his modified work includes a restriction of very heavy lifting.

The record also contains a Qualified or Agreed Medical Evaluator's Findings Summary Form dated September 13, 2001, in which Dr. [REDACTED]

██████████ indicates that Mr. ██████████ has a permanent disability. Dr. ██████████ indicates that Mr. ██████████ can return to work with restrictions.

Mr. ██████████ medical records reflect that he has sustained an injury that has resulted in a permanent disability, and he is under the care of a chiropractor. After a review of the medical documentation in the record, which was only made available on third motion, it is concluded that extreme hardship would be imposed upon Mr. ██████████ whether he accompanied his wife to Mexico or remained in the United States alone or with their two children.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board held that the underlying fraud or misrepresentation may be considered an adverse factor in adjudicating a section 212(i) waiver application in the exercise of discretion. *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in *Matter of Alonso*, 17 I&N Dec. 292 (Comm. 1979); *Matter of Da Silva*, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

It is noted that the Ninth Circuit Court of Appeals in *Carnalla-Muñoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter married Mr. Martinez in Mexico in January 1995 and procured admission into the United States in March 1995 by fraud. Therefore, she did not obtain an after-acquired equity since the fraudulent act occurred after marriage abroad.

The favorable factors include the applicant's marriage, absence of a criminal record, the approved Petition for Alien Relative, and the extreme hardship to the qualifying relative.

The unfavorable factors include her procuring admission into the United States by fraud, and her lengthy unauthorized presence in the United States.

Although the applicant's actions in this matter cannot be condoned, her equity of marriage was gained before procuring admission into the United States by fraud. Therefore, the applicant has now established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the motion will be granted. The order dismissing the appeal will be withdrawn. The appeal will be sustained, and the application will be approved.

ORDER: The order of November 15, 2000, dismissing the appeal is withdrawn. The appeal is sustained and the application is approved.